

Message Text

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ACTION EUR-12

INFO OCT-01 IO-13 ISO-00 FEA-01 AGRE-00 CEA-01 CIAE-00
COME-00 DODE-00 EB-08 FRB-03 H-01 INR-07 INT-05 L-03
LAB-04 NSAE-00 NSC-05 PA-01 AID-05 CIEP-01 SS-15
STR-04 ITC-01 TRSE-00 USIA-06 PRS-01 SP-02 OMB-01
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R 101711Z FEB 77
FM USMISSION EC BRUSSELS
TO SECSTATE WASHDC 2984
INFO USMISSION OECD PARIS
USMISSION MTN GENEVA

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MTN FOR POMERANZ

E.O. 11652:N/A
TAGS: EEC, ETRD
SUBJECT: US-EC DISCUSSION ON GOVERNMENT PROCUREMENT

REF: (A) 76 EC BRUSSELS 12631, (B) 76 EC BRUSSELS 9723

1. SUMMARY: US AND EC OFFICIALS MET FEBRUARY 8 TO DISCUSS
EC DIRECTIVE ON GOVERNMENT PROCUREMENT AND NEXT STEP
TOWARDS MULTILATERAL CODE. TALKS RESULTED IN CLARIFICATION
OF SEVERAL ASPECTS OF EC DIRECTIVE AND PRODUCED SOME EC
MOVEMENT ON ISSUE OF TRANSPARENCY IN MULTILATERAL CODE.
EC IS LIKELY TO REQUEST APRIL MEETING OF TCWP IN OECD.
END SUMMARY.

2. US OFFICIALS POMERANZ, STR; NEWKIRK, MTN; KUWABARA,
USDOC; AND MURPHY, USEC; MET WITH DERISBOURG AND STRUXIANO
FOR DISCUSSION OF GOVERNMENT PROCUREMENT ISSUES. TALKS
WERE PRODUCTIVE AND SHED LIGHT ON HOW THE EC INTERNAL
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DIRECTIVE WOULD BE APPLIED. AMONG THE QUESTIONS
ANSWERED BY THE EC ON THE SUBJECT OF DRAFT DIRECTIVE
(REF. A) WERE:

--ENTRY INTO FORCE: MEMBER STATES ARE NOT LIKELY TO
IMPLEMENT THE DIRECTIVE BEFORE THE FULL EIGHTEEN MONTHS
PRESCRIBED BY THE DIRECTIVE. STRUXIANO INSISTED THAT

COMMISSION WOULD NOT LET MEMBER STATES DELAY ENACTMENT OF NATIONAL LEGISLATION AS HAD HAPPENED UNDER THE PUBLIC WORKS DIRECTIVE (REF. B) AND SAID THAT IN ANY CASE THERE WAS MORE INTEREST IN PUBLIC SUPPLY ON THE PART OF MEMBER STATES SUCH AS ITALY, GIVEN THEIR NEED TO EXPORT, THAN IN THE PUBLIC WORKS DIRECTIVE.

-- DEROGATIONS: THE ONLY EXCEPTIONAL DEROGATIONS WOULD INVOLVE ITALY, WHERE 30 PERCENT OF PUBLIC CONTRACTS ARE TO BE ALLOCATED TO THE MEZZOGIORNO, AND GERMANY WHERE SPECIAL PROVISIONS APPLY TO BERLIN AND BORDER AREAS. COMMISSION HAS PROMISED TO PROVIDE A DETAILED LIST OF SUCH DEROGATIONS.

-- TWO-TIER COVERAGE: DERISBOURG POINTED OUT THAT THERE WAS, IN EFFECT, A TWO-TIER SYSTEM UNDER THE DIRECTIVE. CONTRACTS OVER 200,000 UA WOULD BE COVERED BY THE DIRECTIVE. THOSE CONTRACTS BELOW 200,000 WOULD BE COVERED BY ARTICLES 7 AND 30 OF THE ROME TREATY CONCERNING GENERAL NON-DISCRIMINATION AND PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT. DISPUTE SETTLEMENT FOR THESE CONTRACTS WOULD BE COVERED BY ARTICLE 169 OF THAT TREATY. DERISBOURG ADMITTED THE COMMISSION HAD BEEN LESS THAN VIGILANT ON PAST ABUSES IN GOVERNMENT PROCUREMENT WHILE IT WAS WAITING FOR MEMBER STATES TO APPROVE THE DIRECTIVE. BUT, HE SAID THAT THE COMMISSION HAD FIRM INSTRUCTIONS NOW TO PURSUE EVERY INFRINGEMENT.

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-- THIRD COUNTRY GOODS: THE EC EXPLAINED DETERMINATION OF ORIGIN WOULD BE ACCORDING TO EC'S DEFINITION OF SUBSTANTIAL TRANSFORMATION. IF A PRODUCT WAS CLASSIFIED AS THIRD-COUNTRY, MEMBER STATES WHICH MAINTAINED DISCRIMINATORY TREATMENT VIS-A-VIS THIRD COUNTRIES PRIOR TO ADOPTION OF DIRECTIVE WOULD BE ALLOWED TO DISCRIMINATE AGAINST DIRECT IMPORTS OF THESE GOODS OR INVOKE ROME TREATY ARTICLE 115 TO DISCRIMINATE AGAINST GOODS FROM THIRD COUNTRIES IN FREE CIRCULATION.

-- SUBSIDIARIES OF THIRD-COUNTRY FIRMS: DERISBOURG SAID THERE WOULD BE NO DISCRIMINATION ON THE BASIS OF NATIONALITY FOR FIRMS ESTABLISHED WITHIN THE COMMUNITY.

-- COVERAGE: THE EC SAID THAT IT COULD NOT ENVISAGE INCLUSION OF PRESENTLY EXCLUDED SECTORS OF TELECOMMUNICATIONS, TRANSPORTATION, WATER, AND POWER GENERATION, BEFORE TWO YEARS AT THE VERY EARLIEST, BUT PROBABLY THREE TO FOUR YEARS. EC ALSO DOES NOT

REQUIRE STRICT SECTORAL RECIPROCITY TO ACHIEVE
BALANCED CODE. FOR EXAMPLE, EC WOULD BE WILLING TO
CONSIDER FULL INCLUSION OF COMMUNITY POWER GENERATION
ENTITIES EVEN THOUGH US WOULD ONLY RECIPROCATATE WITH
FEDERALLY-OPERATED FACILITIES.

3. ON THE QUESTION OF TIMING FOR A MULTILATERAL CODE,
EC FEELS THAT IT MUST BE TIED INTO MTN PACKAGE BECAUSE
IT WOULD BE DIFFICULT TO GET US CONGRESS TO REPEAL
BUY AMERICAN LEGISLATION OUTSIDE OF NEGOTIATING
PACKAGE. US SIDE OBJECTED TO THIS INTERPRETATION AND
STATED THAT GOVERNMENT PROCUREMENT CODE COULD GO TO
CONGRESS AT ANY POINT IN TIME AND AS A SELF-BALANCING
AGREEMENT.

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4. ON TRANSPARENCY QUESTION, THE EC WAS STILL NOT
PREPARED TO ACCEPT ALL ELEMENTS OF US POSITION BUT DID
PROMISE TO PREPARE A NON-PAPER WHICH WOULD DELINEATE
WHAT IT WAS PREPARED TO OFFER BY WAY OF INFORMATION TO
LOSING BIDDER. THE EC REMAINS FIRMLY OPPOSED TO
EXPLICIT REFERENCE IN THE CODE TO DISCLOSURE OF
WINNING BID (AMOUNT AND NAME) TO LOSING BIDDERS.
DERISBOURG DID SAY, HOWEVER, THAT HE THOUGHT ARTICLE 33
OF OECD DRAFT CODE COULD BE REWRITTEN TO PROVIDE
DISCLOSURE OF "ALL THE REASONS" FOR LOSING THE BID.
THIS WOULD LEAVE THE RESPONSIBILITY OF DISCLOSING THE

AMOUNT AND NAME OF THE WINNING BIDDER UP TO THE DISCRETION OF THE PURCHASING ENTITY. DERISBOURG'S UNDERSTANDING IS THAT MEMBER STATES WOULD LIKELY TRANSMIT THE AMOUNT BUT NOT THE NAME UNDER THIS PROVISION. HE DID SAY, HOWEVER, THAT ARTICLE 40 CONCERNING BILATERAL CONSULTATIONS COULD BE REWORKED TO REQUIRE THAT GOVERNMENTS TRANSMIT THE NAME OF THE WINNING BIDDER AS WELL TO THE GOVERNMENT OF LOSING BIDDER. US OBJECTED THAT THIS FORMULA WOULD PUT LIMITED OFFICIAL USE

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HEAVY ADMINISTRATIVE STRAIN ON GOVERNMENTS INVOLVED AND WAS NOT LIKELY TO BE ACCEPTABLE TO INDUSTRY.

5. BASIC EC OBJECTION TO GREATER TRANSPARENCY REMAINS FEAR OF SUPPLIER COLLUSION. ALTHOUGH US SIDE TOOK PAINS TO REITERATE LESSON OF US EXPERIENCE IS THAT BROAD COMPETITION ELIMINATES THIS RISK, MEMBER STATES ARE UNLIKELY TO BE WON OVER TO THIS POINT WITHIN TIME FRAME ENVISAGED FOR THE CONCLUSION OF A CODE.

6. REGARDING MARCH 3-4 MEETING IN MTN, THE EC INDICATED THAT IT WAS FAVORABLY DISPOSED TO STRUCTURING INITIAL CONVERSATIONS ON THE CONCEPTS PAPER DRAWN UP BY THE GATT SECRETARIAT. THEY ALSO SAID THEY INTENDED TO SPEAK TO KEY LDC COUNTRIES BEFORE THE MEETING AND WOULD COMPARE NOTES WITH US PRIOR TO START-UP OF MEETING. EC IS FIRM ON NOT WISHING TO FORECLOSE OECD OPTION IF PROGRESS IS SLOW IN MTN. DERISBOURG SAID THAT SCHEDULING OECD MEETING FOR APRIL COULD SERVE AS WARNING TO LDCS ON DC INTENTION NOT TO DELAY CODE.

7. ON DISPUTE SETTLEMENT, EC INDICATED THAT THE COMMUNITY WAS NOT NECESSARILY WEDDED TO THE IDEA OF ONE PROCEDURE FOR ALL AGREEMENTS IN MTN. HINTON

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